No. 08-780

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A. HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners

221140

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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According to the decision below, if a putative class action has been dismissed, then the district court may, while an appeal of that dismissal is pending, certify a settlement class (1) without requiring the settling plaintiffs to establish the requirements of commonality, typicality, predominance, superiority, and adequacy of representation under Rule 23, and (2) imposing releases on the vast majority of class members even though they have no opportunity to obtain a monetary benefit from the settlement. It holds that if a settlement seems "fair and reasonable," the requirements of Rule 23 and due process are irrelevant – precisely the outcome condemned by *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). This Court should grant certiorari because the decision below represents a fundamental retrenchment from this Court's *Amchem* and *Ortiz* precedents. It not only violates the rights of tens of thousands of class members, but invites further abuse of the class action mechanism.

Other than a general statement that the Court "determined that this action meets all the prerequisites of a Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class," the District Court did not require the settling plaintiffs to actually establish those requirements. The Court simply approved the settlement because it believed it was "fair." It stated:

> I still find that this settlement is a fair and reasonable and adequate settlement for this

> case. As we all start out with, Judge Mukasey's previous dismissal of this case cannot be ignored. I think that we all recognize that it means that those who do not participate in the settlement by opting out will see themselves no court-ordered recovery; that no court-ordered recovery would be available unless that decision is reversed by the Second Circuit Court of Appeals and a claim can be substantiated in a court of law.
>
> . . . .
>
> I believe that it is still on the record before me reasonable for plaintiffs to conclude, and a vast majority of the plaintiffs, and the representatives of plaintiffs and lead counsel to conclude that this may likely be the last best hope for some substantial monetary recovery given the reasonable terms of this settlement and the defendant's willingness to participate and fund this agreement.

SJA-64, 65.

The settlement and decisions below undercut the two pillars of *Amchem* and *Ortiz,* which forbid precisely what was done below:

> [T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot-kind, class certifications dependent upon the court's

> gestalt or overarching impression of the settlement's fairness.
>
> . . . .
>
> Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is "fair," then certification is proper.

Amchem, 521 U.S. at 621-22.

Rule 23 Requirements Not Established

The class is defined broadly as *every* Holocaust victim who was a party to any insurance policy sold by Generali or its affiliates or subsidiaries, or any beneficiary or heir of such a person. A-58. The settlement had two categories of benefits: (1) payments on pending claims, i.e. made within the original ICHEIC deadline but not processed before Generali had paid out $100 million, and (2) acceptance of "new claims," originally defined as claims not filed before the original ICHEIC deadline. The parties expanded the definition of "new claims" to include previously denied ICHEIC claims, though they stood no chance of validation without new evidence. A- 511-12. New claims were to be matched against the same Generali Policy Information Center (PIC) database used in ICHEIC. A- 61.

It appears that all or nearly all of the money Generali will pay in the settlement will inure to the benefit of the first group, the very limited group of ICHEIC claimants

whose claims were pending. None of the four named settling plaintiffs were in the first group.

The second group of alleged beneficiaries, class members who could file "new claims," is obviously extremely large, theoretically the rest of the class. But within this group there are tens of thousands of class members who have *no chance* to benefit from the settlement, those: (1) whose ICHEIC claims were previously denied for any of the bogus reasons identified by the media, Congress, and other critics; (2) whose family member bought a policy from one of Generali's eighty-plus subsidiaries or affiliates, whose policy holder information was not published by ICHEIC or included in the settlement database; and (3) who had no idea that a family member owned a Generali policy and never contacted Generali or ICHEIC. They are excluded from any opportunity to benefit from the settlement but would be bound by the releases of which Petitioners have complained. Petition, at 14-21.[1]

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[1] Tellingly, the settling parties attempted to waive the due process rights of class members who had no notice of a possible claim against Generali:

> "Releasors hereby expressly waive and release . . . any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which reads: . . . 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release,'" or any similar law.

A-66-67.

The District Court and Circuit Court ignored the disparate impact of the settlement on this vast group of class members. In so doing, they failed to engage in the required Rule 23(a) and (b)(3) analysis of the commonality, typicality, predominance, superiority, and adequacy of the named plaintiffs necessary for certification of the class, and also ignored the Constitutional and Rules Enabling Act requirements that forbid imposition of releases on class members for no consideration. Petition, at 17; *Amchem*, 521 U.S. at 612, 614-15.; Ortiz, 527 U.S. at 845. While *Amchem* calls for "undiluted, even heightened attention" to these prerequisites for a Rule 23(b)(3) settlement, 521 U.S. at 619, the district court below did just the opposite – it failed to analyze them because it believed the settlement was the best that could be achieved for the small number who might benefit. The Court of Appeals adopted this view.

In addition to *Amchem* and *Ortiz* , these decisions conflict with the clear authority of this Court and other Circuit Courts of Appeal that impose the burden of satisfying the elements of Rule 23 on the settling parties. *See, e.g., General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("Actual, not presumed, conformance with Rule 23(a) remains . . . indispensable.); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003) ("the party seeking certification bears the burden of establishing all elements of Rule 23(a)"); *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (reviewing court must pay "undiluted, even heightened attention" to class certification requirements in settlement).

Corrections to Respondents' Representations of the Record

To cloud the issues and sidestep the due process and Rule 23 violations in the settlement, Generali and Class Counsel obscure or misrepresent the record, or the history of the litigation.

First, Respondents obscure the details of the settlement to conceal the fact that actual benefits to the class are minimal or nonexistent. Petitioners showed that Generali's original ICHEIC "side letter" promising to pay claims in excess of $100 million renders that first category of benefit illusory consideration for a settlement. Petition at 9; A-615. *Maynard v. Durham & Southern Ry.*, 365 U.S. 160, 163 (1961) (payment of wages to which employee was entitled does not support consideration for release); *Norman v. McKee*, 291 F.Supp. 29 (ND.Cal.), *aff'd* 431 F.2d 769 (9th Cir. 1970) (agreement to do something already required by regulators not benefit to class).

Respondents focus on payments to this questionable category of "pending claims" to obscure the fact that benefits to the remainder of the class will be minimal at best. In January 2008, the settling parties told the District Court that $35 million had already been paid since the August 2006 agreement to the first category of claimants, i.e. those whose ICHEIC claims had been pending. SJA-38. In its certiorari response of December 15, 2008, Generali states that "in deference to the age of many applicants," it has "already processed some 14,000 applications and paid more than $36 million despite the lack of finality." By refusing to distinguish between payments to pending claimants (those

submitted before ICHEIC's December 31, 2003 deadline) and payments on "new claims" under the settlement, the settling parties are concealing facts which, if revealed, would enable the courts to properly evaluate what consideration is being paid, and to whom, and at what cost. The courts below refused to hold Respondents to their burden of proving the settlement is fair, reasonable, and adequate. *In re General Motors Corp. Interchange Litig.*, 594 F.2d 1106, 1126, note 30 (7th Cir. 1979) ("although the proponents of any class settlement always bear the burden of proof on the issue of fairness . . . proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence.")

So it is plain that Generali's payment of some $35 million to ICHEIC claimants whose ICHEIC claims were "pending" at the time of the settlement offers virtually no benefits to the class as a whole, leaving the "new claims" process (which excludes broad categories of class members as noted above) as the supposed quid pro quo for the settlement. Then, Generali's promise to two Congressional committees that it would continue to process any "new claims" notwithstanding the ICHEIC deadlines or the settlement deadlines, in order to forestall Federal legislation supporting claimants, made the "bargained-for" releases totally *unnecessary* and compounded the illegality of the deal. *In re Matzo Food Prod.*, 156 F.R.D. 600 (D.N.J. 1994) (rejecting proposed class settlement because defendant already distributed $1.8 million worth of matzo to charities, i.e. the entire consideration under the settlement, which only left attorneys fees in the case.)

In response, Generali makes the shocking claim that its corporate commitment two Congressional committees to continue to process new claims using ICHEIC "standards" no matter what should be *ignored* by this Court on the question of the validity of the settlement. Generali Brief, at 7-8, note 7. It unconscionable for Generali to ask this Court to leave in place its settlement windfall by suggesting its representations to Congress were simply a ploy to avoid the immediate threat of Federal legislation to overturn the court decisions immunizing the company.

On May 8, 2008, Generali wrote the following to the Senate Foreign Affairs Committee:

> Our purpose in writing is to reaffirm Generali's decade-long commitment – which is ongoing and will continue in the future – to resolving claims by Holocaust victims and their heirs. . . .
>
> Generali has conscientiously processed, and paid, claims by Holocaust victims or their heirs on its policies that were in force during the Holocaust era. As recently as February of this year, we reaffirmed our commitment voluntarily to continue processing claims in the future, even after the August 2008 deadline passes for submitting the last possible claims under the class action settlement. The commitment was communicated to Representative Frank, and we continue to stand by it.

Letter from Assicurazioni Generali, S.p.A., to the Honorable Bill Nelson and Norm Coleman, May 8, 2008.

On June 10, 2008, during the Second Circuit argument on the Mukasey dismissal that precipitated the class settlement, one panel member asked Generali's counsel the following question: "Stuart Eizenstat testified earlier this year that since ICHEIC was completed, each insurance company that participates has agreed to continue to process claims that could have been submitted during the ICHEIC process. . . . Is that correct? Generali's counsel answered: "Yes, that is correct." Transcript of Oral Argument in *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, Case No. 05-5602-cv, June 10, 2008, at 77-78.

Generali's current duplicity in this Court is not only troubling, it is ineffective. The company's analogy to *Frazier v. American Airlines, Inc.*, 434 F.Supp.2d 279, 287 (D.Del. 2006), *aff'd* 229 Fed. Appx. 171 (3d Cir. 2007) is unavailing because Petitioners are not attempting to enforce a "promise" such as the one asserted by former TWA employees in that case. Petitioners' rights as class members should never have been compromised because that was the only way *others* might get paid. But Petitioners and other absent class members should certainly not involuntarily be bound by the settlement when Generali has subsequently conceded – to Congress and the Courts – that the *quid pro quo* for the class settlement is actually superfluous.

Next, Generali misrepresents the overlap between class members' claims and this Court's decision in *American Insurance Association, Inc., v. Garamendi*,

539 U.S. 396 (2003). It says the Court struck "state legislation designed to promote" litigation such as these suits against Generali. Generali Brief at 2. This is inaccurate. The vast majority of claims asserted against Generali allege state common law contract and tort causes of action and general consumer protection laws, not Holocaust statutes. The complaints of the four named settling plaintiffs did not raise *any* claims under any "Holocaust statute." Appendix in Appeal No. 05-5602, at 167-216, 271-298.

Further, the issues before the Court in *Garamendi* did not involve any survivors' or heirs' actual claims for relief. *Garamendi* struck down a California statute whose *disclosure* requirements conflicted with the ICHEIC disclosure standards that German companies agreed to follow in the U.S.-Germany Executive Agreement. But as Justice Ginsburg noted, "[t]he Court refers, . . . to a number of other California statutory provisions enabling the litigation of Holocaust-era insurance claims in California courts. Those provisions, it bears emphasis, are not at issue here. The HVIRA imposes no duty to pay any claim, nor does it authorize litigation on any claim. It mandates only information *disclosure*, and our assessment of the HVIRA is properly confined to that requirement alone." 539 U.S. at 434-35 (Ginsburg, J., dissenting) (emphasis in original). According to Petitioner's counsel in oral argument: "[W]e're not dealing in this case with claims by individuals. We're dealing with actions by a State," and "[w]e're not dealing here, to begin with, Justice Ginsburg, with claims by individuals." Transcript of Oral Argument, 2003 WL 21015147, at *7, *8.

Finally, Respondents also misrepresent, or certainly exaggerate, the extent of the U.S. government's opposition to survivors' actions against Generali. Generali Brief at 3, note 4. Generali argues "the U.S. government has confirmed that litigation of Plaintiffs' claims is inconsistent with the Government's policy to resolve Holocaust-related disputes through negotiation," and criticizes Petitioners' characterization of the U.S. government position as "ambiguous." *Id.*

In the Second Circuit oral argument on the Mukasey decision, the Court queried the parties about the record showing the U.S. government had *never* recognized any foreign policy interest in litigation against Generali, an Italian company with no Executive Agreement with the United States. The Court initiated an inquiry to the State Department on that subject, which was answered by a "letter brief" from the Department of Justice (DOJ) in October 2008.

DOJ's 2008 letter brief does not call for dismissal of Plaintiffs' cases against Generali. It states: "The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light of . . . *Garamendi*, except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), . . ." DOJ Letter Brief, at 1-2. As noted above, nearly all of the claims that were asserted against Generali arose under state common law contract and tort theories and general consumer protection statutes, not Holocaust specific statutes.

Yet in the same 2008 letter brief, DOJ also makes the sweeping statements that "it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of insurance claims against companies like Generali that participated in the ICHEIC process;" and "it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States." DOJ Letter Brief, at 9-10. So if the U.S. government position is not "ambiguous," it is certainly not as definitive as Generali suggests.

To further roil the issue, to the extent DOJ's 2008 brief suggests any opposition to Holocaust survivors' litigation against Generali, it conflicts with the position taken by the United States in 2000, immediately after President Clinton singed the Executive Agreement with Germany. At that time, DOJ opposed California's statutory disclosure requirements, but solidly reaffirmed survivors' *litigation* rights:

> — the United States "has not undertaken a duty to achieve legal peace for German companies against state litigation and regulatory action."
>
> — "the Foundation Agreement itself does not preclude individuals from filing suit on their insurance policies in court. . . ."
>
> — the Agreement does not "mandate that individual policyholders or beneficiaries bring their claims in ICHEIC."

> — the American Insurance Association (AIA) "is mistaken in asserting that the Foundation Agreement is in 'direct conflict' with California law, if by this AIA means to suggest that the Agreement by its terms preempts the California statute."
>
> — the District Court "overestimated the Agreement's ultimate legal effect when it predicted that the Agreement would make the Foundation an 'exclusive remedy' as a matter of U.S. law."

Brief for Amicus Curiae the United States of America in Support of Affirmance in *Gerling Global Reinsurance Corp. v. Kelso*, Case No. 00-16163, in the United States Court of Appeals for the Ninth Circuit, at 7-9.

Conclusion

Petitioners therefore respectfully urge the Court to issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners